87 - 1152
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite the Johnson Act, the "express jurisdictional limitations" embodied in 47 U.S.C. § 152(b), and contrary authority, the court of appeals, in a private action under 47 U.S.C. § 401(b) ostensibly brought to obtain obedience to FCC rules relating to separation of revenues and expenses, properly affirmed a federal injunction nullifying wholly intrastate telephone rate orders issued by a duly constituted state rate-making agency, whose decisions were supported by, among other justifications, company statements warranting that higher rates were not needed?

2. Whether such relief ought to be have been barred by the jurisdictional ouster implicit in 28 U.S.C. § 1257, by the Full Faith and Credit Statute, 28 U.S.C. § 1738, or by the policies underlying Article IV, § 1 of the Constitution, as construed by this Court, by reason of

(a) a prior final decision by the highest court of the state holding that, *e.g.*, imposition of rate reductions of the kind attacked below "neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way";

(b) findings in the state ratemaking proceedings at issue below that, *e.g.*, there was "no evidence" that facts had changed from those in the foregoing state court appeals; or

(c) an order by the highest court of the state granting respondent's voluntary motion to dismiss its appeal from the state agency decision attacked in the courts below?

3. Whether, if the above preclusion doctrines did not bar federal relief, relief was nevertheless improper under:

(a) the principles of equity, comity, and federalism reflected in the abstention doctrines, and which the lower courts were bound to apply if litigation of the

federal issues raised below was not barred in state court and administrative proceedings, fully ongoing when the federal complaint was filed; or

(b) precepts of ripeness that bar federal courts from intervening in administrative processes, that, as here, could have provided relief in new commision dockets?

4. Whether, even if some relief was warranted, the court of appeals exceeded or abused its Article III remedial powers by affirmatively ordering rate increases exceeding $10 million per year instead of enjoining only the state agency's claimed improper rate methodology and remanding for a new decision?*

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* Petitioners include the Public Utilities Commission, State of Hawaii, a regulatory agency created by Haw. Rev. Stat. § 269-2 (1985), Chairman Albert Tom, Commissioner Sunao Kido, and Russel S. Nagata, Director of the Department of Commerce and Consumer Affairs of the State of Hawaii, and Consumer Advocate pursuant to *id.* § 269-51, defendants in the district court and appellants in the court below, and their successors. Director Nagata and Chairman Tom have been succeeded by Robert A. Alm, and Hideto Kono, and Chairman Tom has assumed the duties formerly discharged by Commissioner Kido until his death in office. Director Alm, Chairman Kono, and Commissioner Tom acting in their official capacity all concur in and authorize this petition to be filed on their behalf. *See Karcher v. May*, 56 U.S.L.W. 4022, 4024-25 (U.S. Dec. 1, 1987). Commissioner Clyde S. DuPont, who dissented from the commission decisions here, was named as a defendant but did not join in the appeal below, and is not a petitioner. Respondent Hawaiian Telephone Company ("HawTel"), provides intrastate and interstate telephone service in Hawaii and is regulated under Haw. Rev. Stat. § 269-1. According to its brief filed in the court of appeals on November 29, 1985, HawTel is a wholly-owned subsidiary of GTE Corporation, whose stock is traded on various stock exchanges.

Although the United States is not a party, and the demands of 28 U.S.C. § 2403(a) are not clearly implicated by this petition, the Solicitor General is being served so that the United States may have an opportunity to present its views.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

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PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, Chairman; SUNAO KIDO, Commissioner; and RUSSEL S. NAGATA, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Public Utilities Commission of the State of Hawaii; Albert Tom, Chairman; Sunao Kido, Commissioner; and Russel S. Nagata, Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate, together with their successors in office, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 11, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 827 F.2d 1264 (9th Cir. 1987) (*"Hawtel II"*), and is reprinted

in Appendix ["App."] A.* The decisions of the United States District Court for the District of Hawaii granting permanent injunctive relief, granting preliminary injunctive relief, and granting the Consumer Advocate's motion for leave to intervene, are unreported and are reprinted in App. B, C, and D.

Other opinions related to the petition are Public Utilities Commission Order No. 8168, granting reconsideration in part and denying reconsideration in part of Public Utilities Commission Decision and Order 8042 ["D&O 8042"], and D&O 8042, which are reprinted in App. E and G, and the decision of the Supreme Court of Hawaii affirming Public Utilities Commission Decision and Order 7412 ["D&O 7412"], *In re Hawaiian Telephone Co.*, which is reported in 67 Haw. 370, 689 P.2d 741 (1984). (*"Hawtel I"*), and D&O 7412, which are reprinted in App. F and H.

The rulemaking decisions of the Federal Communications Commission dated June 29, 1981, FCC Nos. 81-312 and -313, *Jurisdictional Separations; Integration of Rates and Service for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and Hawaii and Alaska*, which are reported in 87 F.C.C.2d 18 (1981), and 46 Fed. Reg. 38516 (July 28, 1981), are reprinted in App. U.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 11, 1987. On November 27, 1987, Associate Justice Sandra Day O'Connor, on petitioners' application, ordered that the time for filing

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* Because the record necessary to consideration of this petition is voluminous, record material has been reprinted in a separate Appendix. References to the printed record appear within as, *e.g.*, "A ____ ."

this petition be extended to and including January 9, 1988.[1] This petition was filed within the time allowed. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1). Juris-

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[1] Our application was prompted by concerns that a petition for rehearing mailed to the court of appeals on September 25, 1987, the 14th day after judgment, and marked "filed" by the clerk below on September 28, was untimely and thus not tolling the time in which to petition here. *See Bowman v. Loperena*, 311 U.S. 262, 266 (1940). At the time of our application to Justice O'Connor, we also mailed to the court below a Motion to Expedite Consideration of Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc and to Deem Petition Timely Filed. This course, as stated to Justice O'Connor, was intended to "permit the Ninth Circuit added time to grant plenary rehearing and avoid the need for this Court to grant review." App. for Ext. of Time at 5, No. A-424 (U.S. filed Nov. 24, 1987). Regrettably, the court below has yet to act on either the rehearing petition or the motion to expedite.

This Court nevertheless clearly has jurisdiction, *see* 28 U.S.C. § 1254, and the petition below, even if unresolved when this Court acts, should not have any other adverse impact.

First, while conditions must be met by a petition "to review a case pending in a federal court of appeals, before judgment is given in such court," S. Ct. R. 18, here there is a judgment and Rule 18 is inapt. *Cf.* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 6.3 (1986) at 313 (implying that Rule 18 is inapt when Rule 40 petition is filed). *Second*, for the Court to decide whether Rule 18 applies would require expenditure of scare resources on issues on which there is no independent ground for review under Rule 17. *Third*, even if the Court addressed these issues, *cf. R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 506 (1986); S. Ct. R. 21.1(a), it would likely conclude that the petition below was untimely filed. *See* Fed. R. App. P. 40(b) (implying Rule 40 petition is not a "brief" to which Rule 25(a) applies). *Fourth*, while we admittedly relied on Ninth Circuit decisions treating petitions such as ours as timely, *e.g. Gaut v. Sunn*, 792 F.2d 874 (9th Cir. June 20, 1986), *pet. mailed*, No. 83-2320 (July 7, 1986), resp. *ordered* (July 23, 1986), *amended*, 810 F.2d 923 (Feb. 20, 1987), the equities here are properly dealt with by an exercise of discretion by the lower court under Fed. R. App. P. 26(a), as requested in our motion to expedite, or by a decision here to grant certiorari, vacate the judgment below, and remand for consideration of issues presented by the petition for rehearing, or by this petition, on which it is appropriate to have the further views of the court of appeals. *Cf. Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621-22 (1987). The chance that the court below might moot the need for review, or start anew the time in which review might be sought, is thus not different from that in

diction in the United States District Court was alleged to have been conferred by 28 U.S.C. §§ 1331, 1337(a), 1343, 2201 and 2202, and by 47 U.S.C. § 401(b) (1982). The court of appeals sustained the district court's jurisdiction solely on the basis of 47 U.S.C. § 401(b) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part that

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies . . . .

Article IV, section 1 of the United States Constitution provides that

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Article VI, paragraph 2 of the United States Constitution provides in relevant part that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Con-

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any other case properly before this Court. We therefore urge the Court to treat the judgment of the court of appeals as final for purposes of considering the prudential factors that would warrant granting certiorari at this time.

Should the Court be of a contrary view, *i.e.*, that this petition is premature, the Court should dismiss this petition without prejudice to a new petition, or to an appeal. *See California v. Rooney*, 107 S. Ct. 2852, 2855 n.2 (1987). Such an order would be proper under 28 U.S.C. § 1651 and would bind the court below to consider the petition for rehearing on its merits. *See Quern v. Jordan*, 440 U.S. 332, 347 (1979) (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939)).

> stitution or Laws of any State to the Contrary notwithstanding.

Section 1257 of Title 28 of the United States Code provides in relevant part that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .

Section 1342 of Title 28 of the United States Code, known commonly as the Johnson Act, provides that

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain speedy and efficient remedy may be had in the courts of such State.

Section 1738 of Title 28 of the United States Code provides in relevant part that

> The records and judicial proceedings of any court of any . . . State . . . [of the United States] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

Section 152(b) of Title 47 of the United States Code provides in relevant part that

> [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[.]

Section 401(b) of Title 47 of the United States Code provides

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Other provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et. seq.*, are reprinted in App. T. Relevant provisions of Chapter 269, Haw. Rev. Stat., relating to the powers and duties of the Public Utilities Commission, and Chapter 91, Haw. Rev. Stat., the Hawaii Administrative Procedure Act, are reprinted in App. R and S respectively.

STATEMENT OF THE CASE

This case arises out of efforts by the Public Utilities Commission of the State of Hawaii to regulate the intrastate telephone rates of the Hawaiian Telephone Company. Like most local telephone companies, HawTel monopolizes provision of intrastate telephone service. Ac-

cordingly, as elsewhere, HawTel's economic power over intrastate telephone customers is limited by statutorily-authorized rate review by our Public Utilities Commission. Under law, this review is supervised by the Supreme Court of Hawaii on direct appeals authorized by Haw. Rev. Stat. § 269-16(f), and the Administrative Procedure Act, *id.* ch. 91. Federal judicial review of these state court processes is provided by 28 U.S.C. § 1257 (1982).

The central issue in this case is whether, despite this tested system of review—which Congress has carefully reinforced via the Johnson Act[2] and various sections of the Communications Act[3] so as to bar superintendence of state ratemaking functions by the inferior federal courts—it was proper for a federal district court to nullify non-confiscatory state ratemaking orders and grant millions of dollars in relief to redress what it thought was PUC disobedience of FCC-mandated accounting rules, particularly when the district court acted, not only in the face of Congress's express intent to rope off utility ratemaking from such federal control, but also in disregard of settled precepts of comity, equity, and restraint that block federal judicial action.

Indeed, when this federal case began, HawTel had already sought review in state court, and, when federal relief issued, HawTel had forfeited not only its state court appeal, but also any appeal to this Court of past state court rulings that, on facts the PUC had decided were identical to those here, no federal wrong had been committed. In truth, as the state court rulings made plain, all the PUC ever did was hold HawTel to its statements to our Governor, and others, that rates granted by the district court were unnecessary to HawTel's financial well being in "test years"

[2] 28 U.S.C. § 1342 (1982); *see California v. Grace Brethren Church*, 457 U.S. 393, 409-10 & n.21 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 n.28 (1981); *Perez v. Ledesma*, 401 U.S. 82, 129 n.18 (1971) (Brennan, J., dissenting).

[3] *Louisiana Public Service Comm'n v. F.C.C.*, 106 S. Ct. 1890, 1899 (1986) (construing 47 U.S.C. § 152(b) (1982)).

to which the PUC decisions pertained. Because, under PUC rulings, the situation might change in future years, HawTel was free to pursue higher rates in future dockets.

Whether, under these circumstances, the Ninth Circuit correctly affirmed the district court's intrusive ratemaking injunction is the issue to be decided here.

A. The Proceedings in PUC Docket 4588 and Related State Judicial Proceedings.

1. On August 14, 1984, the PUC, in Docket No. 4588, entered a Decision and Order ("D&O 8042") reducing HawTel's intrastate rate of return from 11.25 per cent to 10.15 per cent. D&O 8042 at 14, 134, A 104, 109. The adjustment to HawTel's intrastate return was entered in a rate increase docket filed on December 30, 1982, and was based, pursuant to PUC rules, on "test year" 1983, *id.* at 1, 13, A 90, 103.[4] At the time, FCC regulation of interstate telephone rates generally permitted a return on investment in the interstate rate base, properly calculated, of 10.4 percent, although HawTel apparently enjoyed higher interstate returns. *Id.* at 9, A 98.

2. The PUC ultimately imposed its adjustment to HawTel's rate of return "as a result of the State of Hawaii's, and in turn the ratepayers' support of [a] transitional agreement between [HawTel] and AT&T," D&O 8042 at 11, A 101, and HawTel's failure to prove its intrastate revenue demands were not in "violation of . . . understandings . . . between the State and [HawTel]" concerning the agreement. *Id.* at 10, A 100. These "understandings," rooted wholly in state law, flowed from written representations made at the highest levels by HawTel's corporate officers to Hawaii officials, including the Governor, and

[4] "Test year" methods draw on the rule that "past experience is an indication of the Company's requirements for the future." *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 158 (1930). The converse—that a rate can be nullified as confiscatory absent findings bearing on "value of the property and the revenues and expenses" in the year under review—is not true. *Id.* at 162; *see Minnesota Rate Cases*, 230 U.S. 352, 466 (1913).

our Members of Congress, that major intrastate rate hikes would be averted by their support for a proposed settlement of FCC rulemaking actions related to interstate telephone rates between Hawaii and the mainland. *See In re Hawaiian Telephone Co.*, 67 Haw. 370, 375-76 & nn.4-7, 383-84 & n.13, 689 P.2d 741, 745 & nn. 4-7, 750 & n.13 (1982) ("*HawTel I*"), A 66, 73-74, 84. The FCC proposal, formulated by HawTel and AT&T, charted three changes to interstate rate policies, none of which, absent additional assurances by HawTel, were clearly advantageous to local ratepayers.

a. *First*, the companies would have to January 1, 1985, to "integrate" telephone toll rates for calls between Hawaii and the mainland into the rate structure prevailing in the contiguous States. Beginning in 1972, the FCC had tried to accomplish this goal, which would reduce interstate phone rates, *see In re Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities*, 35 F.C.C.2d 844 (1972), but, without a settlement it seemed that the telephone companies would be able to prolong the matter, as the FCC said, for an "indefinite duration." *See* 46 Fed. Reg. 38516, 38519 (July 28, 1981), A 263. The FCC thought integration deferral "an undesirable aspect of the agreements since it is in the public interest that this be achieved at the earliest possible date," *id.*, a view that was shared by Hawaii. D&O 8042 at 14, A 104.

b. *Second*, to facilitate integration, HawTel would be permitted to employ the NARUC-FCC *Separations Manual*, then-codified at 47 C.F.R. Part 67 (1981), to determine HawTel's allocation of interstate revenues, based on the federally-prescribed criteria for assigning plant, expenses, and revenues to interstate operations. The FCC, in rulemaking proceedings, had adopted the manual for the contiguous States pursuant to 47 U.S.C. § 221(c), "which authorizes [the FCC] to determine 'what property of [a] carrier shall be considered as used in interstate' service for ratemaking purposes," *MCI Telecommunications Corp. v. F.C.C.*, 750 F.2d 135, 140 n.24 (D.C. Cir. 1984), and

had determined in 1976 that rate integration "should be accompanied by cost-based settlements based on prescribed jurisdictional separations procedures." *See* 46 Fed. Reg. 38519 n.7, A 262. Prior to the settlement, no specific federally-prescribed formula had been arrived at, and the NARUC-FCC *Manual*, which embodies the "Ozark Plan," in contrast to the separations formula used by the PUC, known as "Hawaiian Plan II," would, when implemented, place upward pressure on HawTel's intrastate revenue needs. *See* D&O 8042 at 16, A 106 (comparing Ozark, Hawaiian Plan II, and other plans). This, too, was understandably undesirable to our ratepayers.

c. *Third*, in addition to paying HawTel the traditional "cost based settlements" dictated by the *Manual*, AT&T would pay HawTel a substantial subsidy known as the "transitional supplement." *See* 46 Fed. Reg. 38518-19 & n.5, A 260. The transitional supplement, to be paid each year during the transition period 1981-1985, and to be calculated as a declining percentage of the actual interstate revenue growth caused by lowering interstate rates, was on the magnitude of $130 million. *See HawTel I*, 67 Haw. at 375, 689 P.2d at 750, A 73. Supposedly, the transition payments were intended to cushion the "shock" to HawTel occasioned by integration into the national plan and its low rates. As the FCC stated in connection with a settlement implemented to bring our sister State of Alaska into the national rate structure, the transitional supplement was basically a "quid pro quo" for wrapping up the integration proceeding. *See* Mem. Op. & Order No. 86-602, *In re Integration of Rates and Services*, FCC Doc. No. 83-1376 (Dec. 31, 1986). The FCC, without elaboration, stated this feature of the proposal was not "egregiously unreasonable." 46 Fed. Reg. 38519, A 263.

3. Because both the first and second features of the proposed agreement ran counter to the interest of Hawaii ratepayers, HawTel saw it in its interests to make representations to public officials in Hawaii that the settlement, particularly the transitional supplement, would lower *intra*state rates. In response to Governor Ariyoshi's

"pointed query" as to " 'precisely how the users of the Company's intrastate services will directly benefit from the operation of the ... Agreement,' " the President of HawTel, Donald M. Kuyper, wrote that the transition payments " 'lessen the need for local rate increases,' " and that, specifically, FCC approval of the agreement would obviate "a local rate case generating approximately $30-35 million per year or a 25-26% increase in rates to all local customers.' " *HawTel I,* 67 Haw. at 375, 384 n.13, 689 P.2d at 745, 750 n.13, (citation omitted), A 84. Other letters stated the proposal " 'significantly lessens the need to increase local rates to fully allowable levels in order to maintain [an adequate] comparable overall rate of return [for the Company as a whole].' " *Id.* at 375 n.6, 689 P.2d at 745 n.6, A 74. On this basis, the Governor endorsed the agreement before the FCC. *Id.* at 376 n.7, 689 P.2d at 745 n.7, A 74. In approving the plan, the FCC noted this support. 46 Fed. Reg. at 38519, A 261.

4. The rate case to which D&O 8042 pertained was one of a series of HawTel requests for massive intrastate rate hikes following the entry of the federal agreement. When Docket 4588 was filed, the cumulative effect of these rate requests, if granted, would have been to increase intrastate revenues by more than fifty-four percent, more than *twice* the increase HawTel said it would *not* have to file if, as occurred, the transition agreement was approved, D&O 8042 at 5, A 94. Certain customers would be required to endure local telephone rate hikes of one hundred thirty percent. *Id.* at 6, A 95. During these proceedings, based on the evidentiary impact of HawTel's 1980 statements about its revenue needs, as well as the inference that HawTel's highest corporate officers had misled the State, and ought not be believed, the PUC took the 1980 statements into account in its ratesetting decisions.

a. In the first case, Docket 4306, filed on August 25, 1981, where HawTel requested $47.6 million in new annual intrastate revenues, the PUC found that "a representation was made by [HawTel] that, *in the absence of an agreement,* the local ratepayers would be subjected to rate increases

per year of 30-35 million dollars," and that "[t]he State gave its support to the Agreement and [HawTel] did obtain its agreement but [HawTel] nevertheless filed, after the support and been given and before the FCC decision was issued, for another rate increase requesting $47,600,000." The PUC ruled that HawTel's rates, if granted, would deprive local customers of the "reciprocal benefit for the State's support of the Agreement." D&O 7412 at 25, 27-28 A 133, 135-36 (original emphasis). Though the PUC could have on this finding totally disallowed the rate request, it opted for the solution of downwardly adjusting HawTel's intrastate rate of return by only 1.1 percent, an amount corresponding to revenue increases occasioned by the switchover to the Ozark separations formulas. Based on data pertaining to the designated test year, 1982, HawTel was granted new intrastate revenues of $27.1 million. *Id.* at 113, A 141. HawTel appealed to our supreme court. Haw. Rev. Stat. § 269-16(f).

b. The second case, Docket 4588, was filed before D&O 7412 had issued, and sought new intrastate revenues of $108.4 million less any increment awarded in Docket 4306. D&O 8042 at 1, A 91. Reaffirming its decision to adjust HawTel's intrastate profits based on HawTel's refusal to grant "reciprocal benefits to the ratepayers as a result of the State of Hawaii's, and in turn the ratepayers' support of the transitional agreement between [HawTel] and AT&T," *id.* at 11, A 101, the PUC reimposed a 1.1 percent rate adjustment without calculating precisely the benefits HawTel gained under Ozark. The PUC also rejected HawTel's claim that the unjust enrichment issue had become moot. Following *The Minnesota Rate Cases, supra* n.4, the PUC stated:

> Although HTC claimed that the rates to be approved in this docket will be [acted on] sometime in 1984 and 1985 will be the first full year it purportedly will have an opportunity to earn an authorized return, *HTC provided no evidence on what its results of operations would be for 1984 and 1985.* HTC assumed that the revenues, expenses, expenditures and conditions with

> the exception of the transitional supplement would remain status quo. We also note that HTC makes no distinction between an actual and normalized year used in the ratemaking process. *Further, 1983 is the test year and all revenues, expenses and similar items based upon a representative year are used in setting rates for the future.* We reject HTC's position with respect to the mootness of the benefits resulting from the agreement between HTC and AT&T.

D&O 8042 at 13, A 102-03 (emphasis added). The decision, issued on August 14, 1984, granted $30.84 million in additional revenues. *Id.* at 135, A 111. On August 24, 1984, HawTel moved for reconsideration, and, on September 10, 1984, while the motion was pending, filed a timely appeal to the Supreme Court of Hawaii *sub nom. In re Hawaiian Telephone Co.*, No. 10169 (Haw. filed Sept. 10, 1984), A 206.

5. On September 27, 1984, the Supreme Court of Hawaii affirmed the PUC's January, 1983, rulings in D&O 7412. *HawTel I*, 67 Haw. 370, 689 P.2d 741 (1984), A 66. Rejecting claims that the granted rates were "confiscatory," the court observed that, in light of HawTel's 1980 statements, "it would have been surprising if the Commission had *not* looked askance at [HawTel's] plea for . . . $47,600,000 in additional revenue." *Id.* at 384, 689 P.2d at 750 (emphasis added), A 84. Rejecting as "without merit" HawTel's claim that the PUC had "invaded a federally preempted area," *id.* at 385, 689 P.2d at 751, A 85, the court held that the PUC "neither varied a formula, method, or procedure decreed by the federal agency nor tampered with interstate rates in any way," *id.* at 386, 689 P.2d at 751, A 86. The court concluded it was proper "[u]nder these circumstances" for "the Commission to take account of the federal prologue to the local rate case." *Id.* at 386-87, 689 P.2d at 751-52, A 87-89. HawTel did not seek review in this Court.

6. On November 15, 1984, the PUC granted reconsideration in part and denied reconsideration in part in

Docket 4588. Order No. 8168, A 49. It denied reconsideration of the adjustment to HawTel's rate of return, noting that its August ruling was "based upon the precedent and principle first enunciated in Docket No. 4306," and holding that the Supreme Court of Hawaii's ruling "on the subject of transitional supplement" in *HawTel I* "is dispositive of this issue in this reconsideration proceeding." *Id.* at 4-5, A 53-55. The PUC refused to grant a phased rate increase to compensate for the rate adjustment, but only because, as stated in D&O 8042, HTC had failed to prove its costs for 1984 and 1985. *Id.* at 6, A 55. The PUC corrected technical errors, and affirmed its decision. *Id.* at 7-8, A 56-58. On November 21, 1984, HawTel moved under Haw. R. App. P. 42 to dismiss its state court appeal, A 205. On December 7, 1984, as HawTel admits, the motion was granted. A 213 n.1.

B. The Federal Proceedings Below.

1. Before reconsideration had been denied and while HawTel's state court appeal was fully alive, HawTel filed this action on November 2, 1984, in United States District Court, claiming, as it did in the Supreme Court of Hawaii in *HawTel I*, that the PUC had, in imposing the 1.1 percent rate-of-return adjustment, "contradict[ed] the FCC-ordered Separations Manual, and directly violate[d] the FCC's Report and Order [approving the HawTel-AT&T agreement.]" Complaint ¶ 20, No. 84-1306, A 182. Styled like complaints rejected by this Court in *Chesapeake & Potomac Telephone Co. v. Public Service Comm'n,* 106 S. Ct. 2239 (1986), HawTel sought relief under 47 U.S.C. § 401(b) on the ground that, whatever basis for the rate adjustment in state law, the PUC "interfered with the intent of Congress and the FCC to provide for a uniform, nationwide separations methodology." Complaint ¶ 40, A 185. Overruling defenses of prior adjudication, estoppel, waiver, and adequate state remedies, and over protests that "principles of comity support equitable restraint,"[5]

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[5] *See* Intervenor's Answer ¶ 34, No. 84-1306 (Nov. 21, 1984);

the district court entered permanent injunctions mandating that the PUC "make effective schedules of intrastate rates for HTC sufficient to generate additional revenues of $10,507,000," that is, the revenue necessary to bump HawTel's intrastate rate of return back up by 1.1 percent. Judgment for Permanent Injunction at 8, No. 84-1306 (D. Haw. Mar. 28, 1985), A 177. The court rejected the PUC's rationale and subsidiary findings as to the import of HawTel's statements largely by reweighing those intensely factual findings on matters of wholly local concern. In the court's view, the PUC had no right to act because "presumably Hawaii intrastate ratepayers have received some benefit from [the HawTel-AT&T] agreement." *Id.* ¶ 15, A 176. Agreeing HawTel could obtain relief in "another future proceeding before the PUC," the court entered relief nonetheless, ruling the "remedy provided by 47 U.S.C. § 401(b), if available in other respects, is not defeated by the existence of an adequate state judicial remedy." *Id.* ¶¶ 16, 20, A 176.

2. On appeal from the District Court's final judgment, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed. Rejecting the analysis of the Court of Appeals for the First Circuit and other authority, the court's opinion, by Judge Canby, held enforcement of nonadjudicatory FCC orders against state public utility commissions was authorized by 47 U.S.C. § 401(b), 827 F.2d at 1268-72, A 9-19. All but conceding HawTel's claim was a disguised substantive federal attack on the rate order, *id.* at 1275 (citing *The Minnesota Rate Cases*, 230 U.S. 352, 435 (1913)), the court held jurisdiction was not ousted by the Johnson Act because HawTel's action was "based expressly on 47 U.S.C. § 401(b)," and the Johnson Act did not apply. *Id.* at 1273, A 19. Applying federal law

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Defendants' Answer ¶¶ 26, 27, *id.* (Nov. 23, 1984), A 192, 196; Mem. in Opp. to Pl. Motion for Prelim. Inj. at 51, *id.* (D. Haw. Nov. 29, 1984) (quoting, *e.g.*, *Alabama Public Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341 (1951)). A 209. HawTel argued "[t]here is absolutely no basis for abstention." Reply Mem. at 44, No. 84-1306 (D. Haw. Dec. 10, 1984), A 214.

to whether *HawTel I* was binding, the court rejected collateral estoppel on the ground that, although HawTel's attack did not depend on any facts relating to the harm occasioned by the PUC decisions, the material facts had changed because HawTel was suffering more.[6]

3. Turning to the scope of the Communications Act, the court distinguished this Court's ruling in *Louisiana Public Service Comm'n v. FCC,* 106 S. Ct. 1890 (1986), that 47 U.S.C. § 152(b) negates federal "power to regulate, indeed, set, intrastate rates," *id.* at 1900, and that the "express jurisdictional limitations" contained in § 152(b) forbid *any* federal court, absent constitutional injury, to interfere with State orders whose effects are confined to the intrastate rate base, properly calculated, whether such orders reflect "the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or any other policy factor." 106 S. Ct. at 1902. Noting that FCC rules for determining "what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service' " make possible " 'distinct spheres of regulation,' " 827 F.2d at 1276 (quoting 106 S. Ct. at 1902), the court reasoned therefrom that intrastate rates are subject to federal invalidation, independent of any Due Process inquiry, if a court finds the rates were set because the agency *thinks* what the FCC is doing with *inter*state rates is wrong. *Id.* at 1276 & n.30, A 27. Recognizing that D&O 8042 would survive this test because PUC adjusted HawTel's return not because of any quarrel with the FCC, but because the PUC believed HawTel was not playing it straight with the Governor, the court rendered the PUC strictly liable because its orders coincided with the effect of using Hawaiian Plan II, *id.* at 1277, A 28.

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[6] The court did not address ripeness and abstention issues implicated by HawTel's ability to obtain identical relief before the PUC by proving up its 1984-85 expenses, as well as the comity questions raised by the court's interference with complex regulatory processes implicating local issues and in which state proceedings were pending at the commencement of the federal case.

Judge Ferguson dissented, arguing that the court's preclusion analysis was wrong, and that the court's view of § 152(b) embodied "the same kind of argument that [this] Court rejected." *Id.* at 1278-81.

REASONS WHY THE WRIT SHOULD BE GRANTED

Judge Ferguson could not have better isolated the defects in the panel's analysis when he wrote that "[t]he majority's opinion misconstrues the Supreme Court's recent decision in *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), and in so doing pays scant heed to the important federalism concerns that lie at the heart of this case." 827 F.2d at 1278, A 29. While certiorari is warranted to resolve the direct conflict between *HawTel II* and the First Circuit's reasoned opinion that rulemaking orders are not enforceable under 47 U.S.C. § 401(b), *New England Telephone and Telegraph Co. v. PUC*, 742 F.2d 1 (1st Cir. 1984), *cert. denied*, 106 S. Ct. 2902 (1986), the factors counseling review of whether the court below misconstrued the "express jurisdictional limitations" of 47 U.S.C. § 152(b), *Louisiana*, 106 S. Ct. at 1899, could not be clearer. The lower court's treatment of the *Louisiana* issue not only subverts the reasoning of that opinion and preemption doctrine generally, *see* this Court's Rule 17.1(c), but leads to results that make nonsense of the Johnson Act, and generates, preclusion issues aside, a blatant conflict with the decision in *HawTel I* disposing of identical federal claims. *Id.* 17.1(a).

The reasons warranting review are even more compelling given the lower court's failure to observe the precepts that constrain the power of the inferior federal courts to decide novel issues, such as those here, and that "soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987). Regardless whether the Ninth Circuit misapplied the Communications Act, the opinion below departed from numerous doctrines, from abstention to res judicata, that, properly applied, would have eliminated "commit[ment] of the resources of [the lower] court[s]

to redundant litigation," and prevented "a contravention of those principles of comity which underlie the federal system." 827 F.2d at 1281 (Ferguson, J., dissenting), A 36. This departure merits this Court's review and correction.

I. The Ninth Circuit's Expansive Interpretation of the Communications Act Raises Substantial Questions Meriting this Court's Review.

In affirming an injunction awarding HawTel more than $10 million annually in new intrastate revenues, the Ninth Circuit held that (1) the FCC's rulemaking order was enforceable in a private action against the PUC under 47 U.S.C. § 401(b); and (2) neither 47 U.S.C. § 152(b), *Louisiana Public Service Commission v. FCC,* 106 S. Ct. 1890 (1986), nor the Johnson Act "stand in the way" of such injunctive relief. *HawTel II,* 827 F.2d at 1268-73, 1276, A 9-19, 25-27. This analysis is wrong on both fronts.

A. The Ninth Circuit's Extension of 47 U.S.C. § 401(b) is in Direct Conflict with the First Circuit and Warrants Review.

As the First Circuit held in *New England Telephone & Telegraph Co. v. PUC,* 742 F.2d 1 (1st Cir. 1984), *cert. denied,* 106 S. Ct. 2902 (1986), non-adjudicatory orders, such as the FCC's rulemaking order mandating application of the separations *Manual* to Hawaii, are not properly "orders" for purposes of 47 U.S.C. § 401(b). The only valid[7] precedent the panel below relied upon to support its contrary view, the unreviewed Seventh Circuit decision in *Illinois Bell Telephone v. Illinois Commerce Comm'n,* 740 F.2d 566 (7th Cir. 1984), does not address the matter expressly, and relies on the district court opinion which the First Circuit reversed in *New England Telephone. See* 740 F.2d at 571. By contrast, Judge Breyer's opinion offers at least ten general reasons for reading § 401(b) nar-

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[7] As the panel recognized, 827 F.2d at 1271 n.19, decisions that "have been vacated and remanded or reversed on other grounds," *id.*, are "deprive[d] . . . of precedential effect." *County of Los Angeles v. Davis,* 440 U.S. 625, 634 n.6 (1978).

rowly,[8] most of which are ignored and none of which are rebutted in *HawTel II*. Indeed, the Ninth Circuit panel's offer to forum-shopping litigants that prior adverse state court decisions need be of no concern in the federal courts, even if correct as a matter of preclusion law, *but see infra*, proves well the dangers of "fractionated review" predicted by the First Circuit. This and the other conflicts between the First and Ninth Circuit's analysis warrant this Court's review.

B. The Ninth Circuit's Narrowing of 47 U.S.C. § 152(b) and Misconstruction of *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), Warrants This Court's Review.

To avoid the impact of 47 U.S.C. § 152(b), and *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986), the Ninth Circuit reasoned that (1) "FCC separations orders control the state regulatory bodies, because

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[8] These include: (1) the propriety of using the APA's definition of "rule" and "order" "in determining the proper construction" of the Act, 742 F.2d at 5; (2) the "established principle" that enforcement of the Communication Act is entrusted to administrative control, *id.*; (3) the danger that, given the indeterminacy of rules, courts in private actions will come to conflicting results, *id.*; (4) doubts about the validity of preenforcement review, *id.* at 7; (5) laws, *e.g.*, 47 U.S.C. §§ 201, 204, 205, 209, 214(d), and 416(a), showing "Congress assumed that 'orders' took the form of specific directives to parties," 742 F.2d at 7; (6) "fractionated review" occasioned when litigants carve federal issues out of state court processes, *id.*; (7) differences in functions between § 401(b) and § 402 that warrant distinguishing *CBS v. United States*, 316 U.S. 407 (1942), 742 F.2d at 7-8; (8) insufficiency of the FCC's "obvious" authority "to impose preemptive nation-wide rules" to require a broad reading of § 401(b) given that state courts and declaratory proceedings are available, 742 F.2d at 9; (9) lack of other precedent, *id.* at 10; and (10) of countervailing agency construction, *id.* at 11.

Despite the fact that the Johnson Act was passed within weeks of the Communications Act, the Ninth Circuit held the term "person" encompasses the PUC or its commissioners, *but cf. Quern v. Jordan*, 440 U.S. 332 (1979), in part because § 401(b) is needed lest state commissions "be free to violate FCC orders with impunity," 827 F.2d at 1270, A 12. *But see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985).

a nationwide telecommunications system with dual intrastate and interstate rates can operate effectively only if one set of separations procedures is employed"; (2) thus States may not set low intrastate rates because they believe allocation of costs to the interstate base is "too low"; and (3) in downwardly adjusting HawTel's rate of return because of HawTel's statements the PUC was thus engaging in a preempted regulatory practice. 827 F.2d at 1275, 1277 & n.30, A 24, 27 & n.30. This logic grossly overstates the role of federal separations formulas and, in so doing, inverts the reasoning of *Louisiana* and yields anomalous results this Court, and, as important, Congress, could not possibly have intended.

The message of *Louisiana Public Service Commission* is simple and clear. Unless "it [is] *not* possible to separate the interstate and intrastate components of the asserted FCC regulation," 106 S. Ct. at 1902 n.4, States are free to act within the sphere set off by § 152(b)—the realm of "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." In *Louisiana*, because of the FCC separations formulas, it was possible to separate the interstate and intrastate components of the regulation. As *Louisiana* shows, separations formulas are a means to an end: permitting States to enjoy the freedom to set depreciation schedules over the federally-defined intrastate portion of the rate base. The formulas are not ends in themselves. *If* States wish to regulate depreciation, they must follow the federal separations formula so they know which portion of, for example, a phone booth is theirs to govern.

By contrast, these constraints are absent here, where a State simply sets an overall rate of return on the federally-prescribed intrastate rate base, and lets the company impose charges to generate revenues to yield that return. If a rate-making body for some reason prefers the rate of return that is generated by a separations formula *other* than that prescribed by the FCC, it is, and should be the State's prerogative to set that rate. The State is doing nothing to negate federal interests, except insofar as such

rates are confiscatory, in which case under the Johnson Act federal power is discharged by the state courts subject to review here. In this case, therefore, the Johnson Act and § 152(b), taken together, simply leave no room for intervention by the inferior federal courts.

The panel turns this balance upside down. Whereas under *Louisiana* States are free, subject to the Due Process Clause, to set the rate of return on the intrastate rate base on the basis of "the perceived need to improve the industry's cash flow, spur investment, subsidize one class of customer, or *any other policy factor*," 106 S. Ct. at 1902 (emphasis added), under *HawTel II* state commissions may be enjoined if it can be shown they are thinking rates for the interstate base are generating too much revenue. *HawTel II*, 827 F.2d at 1277 n.30, A 27. Likewise, whereas under the Johnson Act States are intended to be spared from federal injunctions upon claims that rates are confiscatory, under *HawTel II* utilities need not even bother with the Due Process Clause's rigorous standards.[9] Under *HawTel II*, if a State is allegedly misapportioning costs, that claimed wrong can be redressed in United States District Court in an action "based expressly on 47 U.S.C. 401(b) and FCC Order 81-312." 827 F.2d at 1273. Indeed, taken seriously, under the panel decision if a State wished to set a rate of return *higher* than that yielded by the FCC formulas, that too could be blocked by a proper plaintiff under 47 U.S.C. § 401(b).

This is not, and could not be the law. Within the sphere reserved by 47 U.S.C. § 152(b), "regulation of maximum rates or prices 'may, consistently with the Constitution, limit stringently the return recovered on investment,' " *FCC v. Florida Power Corp.*, 107 S. Ct. 1107, 1113 (1987),

[9] It is dubious whether Congress, through the Communications Act intended that the FCC separations rules be binding in state court adjudication under the Due Process Clause. As this Court held in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), as a constitutional matter "only reasonable measures" need be used to apportion the rate bases. *Id.* at 150; *MCI Telecom. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984).

and, under 28 U.S.C. § 1342, claims under these standards are to be raised in state court. *See California v. Grace Brethren Church*, 457 U.S. 393, 409-10 & n.21 (1982). Given the "express jurisdictional limitations" imposed by § 152(b), no FCC separations formula may constrain State discretion in this area. The panel's "narrowing construction [of § 152(b)] [thus] does not constitute avoidance of a constitutional difficulty, [bu]t merely frustrates permissible applications of a statute." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985).

Indeed, given the overwhelming state law basis for downwardly adjusting HawTel's rate of return,[10] the judgment below is without precedent. As the Supreme Court of Hawaii held in *HawTel I*, in 1983 "it would have been surprising if the PUC had not looked askance at a plea for approval of intrastate rate schedules calculated to produce $47,600,000 in additional revenue." 67 Haw. 384, 689 P.2d 745, A 84. Given HawTel's total rate demands, which exceeded $100 million by August, 1984, that statement was doubly applicable to D&O 8042. The prerogative to address HawTel's conduct fully answered any preemption claim challenging the coincidence of the 1.1 percent adjustment with the effects of Hawaiian Plan II, even if, contrary to *Louisiana*, intent in acting within the sphere created by the "sweeping" language of § 152(b), is somehow relevant. *Cf. Mt. Healthy Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In short, the panel had no good answer to Judge Ferguson's observation that "[t]he argument that HawTel made, and the district court accepted, that the Hawaii PUC's actions constituted an evasion of the federal separations procedures, is essentially the same kind of ar-

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[10] *See University of Hawaii Professional Assembly v. University of Hawaii*, 66 Haw. 214, 221, 659 P.2d 720, 725-26 (1983); Haw. Rev. Stat. §710-1062 (1985). This Court's accommodation of such traditional local concerns as that corporate officials subject to regulation be scrupulously forthright in their dealings with government officials is demonstrated in numerous decisions, *e.g.*, *Kelley v. Robinson*, 107 S. Ct. 353 (1986).

gument that the Court rejected in *Louisiana*." 827 F.2d at 1279, A 33. Although *Louisiana* "is not strictly controlling, in the sense that no holding can be broader than the facts before the court," *United States v. Stanley*, 107 S. Ct. 3054, 3062 (1987), there is no basis for so ignoring the "reasoning" of this Court's decisions. *Id.* at 3063. Accordingly, and because the Ninth Circuit's decision also creates a conflict with the Supreme Court of Hawaii's decision in *HawTel I* which merits review, the Court should grant the writ and summarily reverse or grant plenary review.

II. The Ninth Circuit's Decision to Reach the Merits Contravened Settled Rules Precluding Redundant Litigation of Federal Questions.

The panel's decision to enter the business of overseeing Hawaii's utility ratemaking processes not only misconstrued the Communications Act and the policies of the Johnson Act. As Judge Ferguson protested, had the panel properly applied settled preclusion rules it would not have even reached those issues.

As in *Parsons Steel, Inc. v. First Alabama Bank*, 475 U.S. 518 (1986), the Ninth Circuit "gave unwarrantedly short shrift to the important values of federalism embodied in the Full Faith and Credit Act." *Id.* at 523. That statute, 28 U.S.C. § 1738, " 'does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.' " *Id.* (quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982)). The panel below completely overlooked this mandate when, applying federal preclusion concepts drawn from *Commissioner v. Sunnen*, 333 U.S. 591 (1948), it interpreted *HawTel I*, and inexplicably ignored entirely HawTel's forfeiture of its appeal from D&O 8042.

Both decisions were likely material to the judgment below. Hawaii courts do recognize exceptions to the normal

rules of preclusion " 'to avoid inequitable administration of the laws.' " *Marsland v. ISKCON*, 66 Haw. 119, 125, 657 P2d 1035, 1039 (citation omitted), *appeal dismissed*, 464 U.S. 805 (1983). But how these standards apply are just as keenly questions of state law as the exceptions' existence. As shown above *supra* n.10, Hawaii's rules of estoppel, which lie at the heart of the PUC's action in D&O 7412 and *HawTel I*, are central to the administration of our laws. If the Ninth Circuit had any doubts that, under *Marsland*, these policies would not have been given full force, it should have entered a *Pullman* abstention order and certified the issue over to the Supreme Court of Hawaii pursuant to Rule 13, Haw. R. App. P. *See Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941). Only last Term this Court found the presence of certification rules critical to whether *Pullman* abstention should be ordered. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 107 S. Ct. 2568, 2572 (1987). The purposes of *Pullman* abstention would have been clearly served by certification, for a ruling favorable to petitioners would have " 'rendered unnecessary or substantially modif[ied] the federal constitutional question.' " *Id.* (quoting *Harmon v. Forssenius*, 380 U.S. 528, 535 (1965)). Consideration of *Pullman* abstention is mandatory. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977).

The same procedure was even more forcefully applicable to HawTel's dismissal of its state court appeal from the very ratemaking order at issue. Although HawTel sought to paper over this forfeiture by asserting in both courts below that its appellate Rule 42 dismissal had no effect, it offered no authority for this view, *see* A 213 n.1. The Rule, which is identical to Fed. R. App. P. 42, on its face makes its invocation fatal to any attempt to reopen the issues that could have been litigated on appeal. Unlike Haw. R. Civ. P. 41, the counterpart to Fed. R. Civ. P. 41, Hawaii appellate Rule 42 does not give litigants one free bite.

Even on the panel view that *Sunnen* provided the guidance needed, as Judge Ferguson proved, the majority mis-

applied that case. Under HawTel's federal claim, the degree of harm suffered by reason of misapplication of the FCC separations formulas is irrelevant to preemption: any departure is illegal. That HawTel might suffer more by letting the D&O 8042 rates stand in 1985 was not, as Judge Ferguson pointed out, " 'a subsequent modification of the significant facts.' " 827 F.2d at 1281 (quoting *Sunnen,* 333 U.S. at 599)), A 35. Indeed nowhere does the lower court justify permitting HawTel to argue that facts had changed when the PUC had found, specifically, that HawTel had "no evidence" showing that its revenue picture in 1985 was any different from that in test year 1983. HawTel could not have escaped this conclusion on appeal to the Supreme Court of Hawaii, *see* Haw. Rev. Stat. §§ 91-9(g), 91-14(g)(5), A 236, 239, and, under *University of Tennessee v. Elliott,* 106 S. Ct. 3220 (1986), it was the lower court's duty to "give the agency's factfinding the same preclusive effect to which it would be entitled in the State courts." *Id.* at 3227. Thus, wholly apart from the limits implicit in 28 U.S.C. § 1257, *see District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), which blocked the district court jurisdictionally from reopening the broad preemption issue that was "inextricably intertwined" with the judgment in *HawTel I,* as well as the issues HawTel clearly could have, but did not pursue in its forfeited second appeal, *see* 460 U.S. at 483-84 & n.16, the principles of comity completely foreclosed the Ninth Circuit from reaching the Supremacy Clause issues raised below. This clear departure from this Court's precedents merits correction.

III. Even if Litigation was Not Foreclosed, the Ninth Circuit's Refusal to Abstain Was Plain and Obvious Error.

Even if the panel had correctly concluded that litigation in the state court was not barred and that the *Feldman* doctrine did not apply, it was still the lower court's duty to order this case dismissed. When a federal court "conclude[s] that [a] state-court judgment is not entitled to preclusive effect under [state] law," it is then bound "to decide the propriety of a federal-court injunction under the

general principles of equity, comity, and federalism[.]" *Parsons Steel*, 474 U.S. at 526 (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972)); *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir. 1987).

Those principles were emasculated by the lower courts' decisions to reach the merits. Under the familiar three-part test set forth in *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), this was an instance in which the principles of *Younger v. Harris*, 401 U.S. 37 (1971), to which *Mitchum* refers, were fully in play. Not only was a state judicial proceeding—HawTel's appeal from D&O 8042—fully ongoing, that appeal, as HawTel conceded, *see* 827 F.2d at 1273, A 19, offered a full opportunity to raise federal questions in state court. *Cf. Monaghan v. Deakins*, 798 F.2d 632 (3rd Circ. 1986), *cert. granted*, 107 S. Ct. 946 (1987). Nor could there be debate that the "important state interests" prong, *Middlesex*, 457 U.S. at 432, was met. This Court, as early as *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), held that proceedings "in aid of and closely related to criminal statutes," *id.* at 604, such as the false statements law, Haw. Rev. Stat. § 710-1062 (1985), implicate interests sufficient to warrant *Younger* abstention. Here, of course, there might not have been proof beyond a reasonable doubt that HawTel's statements were intentionally misleading, but it was appropriate, and sufficient for *Younger* purposes, for the State to raise its concerns in the PUC proceedings in order to protect the public from overreaching by one of its largest monopolies. *See Trainor v. Hernandez*, 431 U.S. 434, 444 (1977). Indeed, if these interests were not enough, the interest in prosecuting our prior judgment in *HawTel I* in the second state court appeal was no different from that found last Term to be sufficient in *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987). Here, as in *Pennzoil*, *Younger* abstention is fully warranted by "the importance to the States of enforcing the orders and judgments of their courts." *Id.* at 1527. Indeed, even the concurring Justices in *Pennzoil*, who voiced concerns that Texas' "negligible" and "attenuated" interests in the lien and bond dispute

lacked the "substantive" force present in previous *Younger* cases, should be persuaded that abstention is proper here. *Id.* at 1530 (Brennan, J., joined by Marshall, J.); *id.* at 1534 (Blackmun, J.); *id.* at 1536 n.2 (Stevens, J.). Here the State of Hawaii's interests could not be more "substantive"; they were neither "negligible," nor "attenuated." And, of course, just as HawTel could not "escape *Younger* abstention by failing to assert its state remedies in a timely manner,' *id.* at 1529 n.16, it could not, by abandoning its state court appeal altogether, avoid the "outright dismissal," *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), which *Younger* requires. *Pennzoil*, 107 S. Ct. at 1528.

Abstention was all the more warranted by the *Burford* doctrine, *see Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Comm'n v. Southern Railway Co.*, 341 U.S. 341, 345 (1951); *Law Enforcement Insurance Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *New Orleans Public Service v. City of New Orlenas*, 798 F.2d 858, 862 (5th Cir. 1986). *Burford*'s bar on interference with administrative orders emanating from a unified regulatory scheme overseen by the state courts was fully required here, for however the preemption issue is framed, the district court was squarely "asked to intervene in resolving [an] essentially local problem." *Alabama Public Service*, 341 U.S. at 347. That problem was to what degree HawTel was to be believed, and to what extent the PUC was entitled to consider HawTel's requests "disingenuous under the circumstances." 827 F.2d at 1267 n.2. That the district court disagreed with the PUC over what were the PUC "understandings" with HawTel and the court below did not find HawTel's shifting positions worthy of mention are only evidence of the " 'misunderstanding of local law, and needless federal conflict with the state policy' " to which the *Burford* doctrine is targeted. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 122 n.32 (1984) (quoting *Burford*). In refusing to abstain, the court of appeals wrongly ignored the "complex of considerations designed to soften the tensions inherent in a system that

contemplates parallel judicial processes," *Pennzoil,* 107 S. Ct. at 1526 n.9. This plain and obvious failure merits review and reversal by this Court.

IV. The Ninth Circuit's Refusal to Invoke the Doctrine of Administrative Finality also Warrants Review.

Even if preclusion was unwarranted and the abstention doctrines inapt, the lower courts should not have entered the fray for still another reason: HawTel's real claim, at least as conceived and postured by the court of appeals, was not ripe.

The Ninth Circuit asserted that if HawTel had any claim left after *HawTel I,* it was that its rate of return was being lowered during the period after which AT&T would stop paying the transitional supplement. 827 F.2d at 1274. If this was true what the Ninth Circuit failed to appreciate was that HawTel had the opportunity to file before the PUC to correct the perceived problem, but did not timely do so. Rather, HawTel simply argued in Docket 4588, which had been addressing 1983, that its situation would change in 1985, but offered no proof of its 1985 total revenue picture, *see* D&O 8042 at 13, A 103, a prerequisite under Commission rules, *see* D&O 7412 at 2, A 123, and decades of rate decisions. *See, e.g., The Minnesota Rate Cases,* 230 U.S. at 466.

In *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), this Court, in a Takings context, observed that the requirement of administrative finality precludes federal jurisdiction until "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question." *Id.* at 191. To overcome the finality rule, a litigant must show that it has completed administrative requirements and applied for variances. *Id.* at 188; *see also MacDonald, Sommer & Frates v. Yolo County,* 106 S. Ct. 2561, 2567-68 (1986). Litigants, moreover, may not recover for "normal delays in litigation." *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S. Ct. 2378, 2389 (1987).

And that claimants have been denied "exceedingly grandiose" relief, *MacDonald,* 106 S. Ct. at 2569 n.9, does not entitle them to plead in federal court for less, because there is no assurance that "less ambitious plans will recieve similarly unfavorable reviews [from the agency]." *Id.*

Much like the lower courts in *Williamson County,* the Ninth Circuit here cavalierly aborted ongoing regulatory processes not only when there was no need to do so, but when there was no power under Article III. HawTel, to be sure, had asked for "grandiose relief" in the form of immediate rate hikes, but the PUC's denials, spirited as they were, could not be taken as indicative of how the Commission would exercise its discretion in future rate dockets. Under this Court's decisions, HawTel's attack on D&O 8042 should have been dismissed as an example of "tilting at windmills," *Quern v. Jordan,* 440 U.S. 332, 338 (1979); *see I.L.W.U. Local 37 v. Boyd,* 347 U.S. 222, 224 (1954). Instead, HawTel's evidentiary failures were rewarded with massive injunctive relief. This conflict between the panel's precipitous intrusion into an ongoing rate process and this Court's ripeness decisions warrants review in this Court.

V. The Ninth Circuit's Remedial Order Violated Article III.

In defining the the federal courts' powers, this Court has held time and again that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley,* 418 U.S. 717, 744 (1974); *accord, Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977); *see also City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986); *Allen v. Wright,* 468 U.S. 737, 751, 759 (1984).

The panel acknowledged this precept in seeking to limit the issue before it by writing reassuringly that it was not about to "preempt state ratemaking," but rather "inconsistent separations adopted, openly or otherwise, by the state for the purposes of establishing the intrastate rate base." *HawTel II,* 827 F.2d at 1275 n.29. But the court's

remedy—a mandatory injunction affirmatively granting new annual revenues of $10 million—was plainly in excess of the "nature and extent of the constitutional violation." Whereas on the panel's understanding of *Louisiana* a simple injunction mandating what it thought were the correct accounting rules would have sufficed, the panel's remedy usurped the PUC's ratesetting power lock, stock, and barrel. This intrusion upon State prerogatives not only flouts the jurisdictional precepts of *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984), and provides an added compelling ground for granting certiorari, it proves more than ever that the decision below, permitted to stand, would grant the lower federal courts an unchecked commission to override the public utility ratemaking bodies of the States comprising the Ninth Judicial Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and summarily reverse, or grant plenary review. Because several of the decisions of this Court relied upon in this petition were not handed down until after the case was submitted below, under the circumstances of this case if the Court believes that reversal or plenary review is inappropriate, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of the arguments presented in this petition, or such portions thereof which the Court finds it would be appropriate to have the added views of the court of appeals. To facilitate this Court's disposition of the second question presented, we also respectfully suggest to the Court that it may wish to certify questions of state law to the Supreme Court of Hawaii under Haw. R. App. P. 13 relating to whether, in the courts of the State of Hawaii, the judgment in *HawTel I,* or the order granting HawTel's motion to dismiss its appeal in No. 10169 (Haw. filed Sept. 10, 1984), would bar relief of the sort granted by the district court here.

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